also provide for public availability of network information. In light of these factors, we see no reason to expand the requirements in section 259(c) beyond the clear obligations on providing incumbent LECs to the qualifying carriers with which it has reached section 259 agreements.

152. We disagree with RTC's assertion that section 259(c) requires providing incumbent LECs to involve qualifying carriers in their network planning process.[386] While we believe that parties to an infrastructure sharing agreement may find such an arrangement useful, we conclude that section 259(c) does not require the "coordinated deployment schedule" suggested by RTC. We do not believe that section 259(c) was intended to insert qualifying carriers into the network planning and decision-making process of the providing incumbent LECs. At the same time, we note that providing incumbent LECs may have obligations to coordinate network planning and design under sections 251(a)[387], 256[388], 273(e)(3)[389] and other provisions. Accordingly, we conclude that section 259(c) does not include a requirement that providing incumbent LECs provide information on planned deployments of telecommunications and services prior to the make/buy point, *i.e.*, the point at which a providing incumbent LEC decides to manufacture itself, or to procure from an unaffiliated entity, products that affect telecommunications services or equipment. As discussed more fully in Section III. B. 2., *supra*, we agree with USTA that section 259 does not generally require providing incumbent LECs to share competitively sensitive, proprietary, or trade secret information. To the extent that section 259 agreements do involve such proprietary information, we believe that parties will be able to negotiate the appropriate use of non-disclosure agreements.

E. Qualifying Carriers Under Section 259(d)

1. Background

153. In the NPRM, we sought comment on the definition of a qualifying carrier as a telecommunications carrier that "lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to section 259(d)(1)." We noted that "economies of scale" exist where a lower unit cost of production can be achieved by a production

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[385] *See, e.g.*, 47 C.F.R. § 68.110(b) (notice of certain changes in telephone company communications facilities, equipment, operations or procedures).

[386] RTC Comments at 18. Specifically, RTC asks the Commission to require that section 259(c) information disclosure be provided prior to the make/buy point at which the providing incumbent LEC decides to manufacture itself, or to procure from an unaffiliated entity, products that affect telecommunications services or equipment.

[387] 47 U.S.C. § 251(a).

[388] 47 U.S.C. § 256.

[389] 47 U.S.C. § 273(e)(3).

process that is designed to produce a larger total quantity of a particular product or service.[390] We also noted that "economies of scope" exist where two or more products or services can be produced at a lower total cost if they are produced jointly rather than separately.[391] We requested comment generally on how to determine whether a qualifying carrier lacks economies of scale or scope and, in particular, on whether there is a relationship of economies of scale or scope to carrier size. We inquired if there are classes of carriers that would, *per se*, qualify as lacking economies of scale or scope and, in particular, whether a carrier's status as a "rural telephone company" under the definition established in section 3(37) should create such a presumption. We also asked if the Commission should determine whether carriers lack economies of scale of scope at the holding company level or at some other level of organization. We inquired if an incumbent LEC could be both a "qualifying" and a "providing" carrier for purposes of section 259, for different items falling within the definition of "public switched infrastructure, technology, information, and telecommunications facilities and function." Finally, we tentatively concluded that a factor to be considered in whether an otherwise qualifying carrier lacks economies of scale or scope is the cost of the investment that the carrier would incur to acquire on its own the requested infrastructure, relative to the cost that it would incur to obtain the requested infrastructure from the incumbent LEC.[392]

154. Section 259(d)(2) adds the additional requirement that a "qualifying carrier" is one that "offers universal telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e)." We noted the recommendations of the Federal-State Joint Board on universal service and, further, that the Commission, pursuant to section 254(a)(2), must issue its final decision and rules on or before May 8, 1997. We stated that, consequently, the Commission need not consider or construe section 259(d)(2) in this rulemaking.[393]

2. Comments

[390] Economies of scale exist where relatively large producers can supply their products at a lower average cost per unit than relatively small producers. *See* F.M. Scherer and Davis Ross, *Industrial Market Structure and Economic Performance* 97 (1990).

[391] Economies of scope exist where it is less costly for a single firm to produce a bundle of goods or services together than it is for two or more firms, each specializing in distinct product lines, to produce them separately. *See, e.g.*, John C. Panzar and Robert D. Willig, *Economies of Scope*, 71 American Economic Review of Papers and Proceedings 268 (1981); William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* 71-79 (1982); Daniel F. Spulber, *Regulation and Markets* 114-115 (1989).

[392] NPRM at ¶ 37.

[393] NPRM at ¶ 38.

155. Frontier notes that neither the Act nor the legislative history define what constitutes a lack of economies of scale or scope.[394] Those parties who comment on the textbook definitions of "economies of scale" and "economies of scope" cited in the NPRM restate the two definitions either directly[395] or implicitly.[396]

156. Regarding whether there is a necessary relationship of economies of scale or scope with carrier size, comments suggest that there may be such a relationship but that the nature of the relationship is complex and inherently based on the facts of particular situations.[397] MCI provides an extensive discussion of the general relevance of size to economies of scale and scope in a discussion that indicates the practical complexities inherent in making any specific determination of the extent of either economies of scale or economies of scope.

> Size is related to the presence of economies of scale. Economies of scale exist *when* output can be increased at a faster rate than costs are incurred. Being able to serve market *large enough* to take advantage of this phenomenon is a necessary condition for realizing economies of scale. Size economies *may* manifest themselves at the plant, company, or holding company level. Economies of financing are *more likely* to occur at the holding company level. Economies of product and technological development *may* occur at the holding company and company level. Operational economies are *more likely* to occur at the plant level.
>
> Economies of scope exist *when* two or more products can be jointly produced, delivered, or marketed at a lower combined cost than if they were produced, delivered, or marketed separately. Economies of scope are *more likely* to occur at the plant and company level, since these are the levels where production, marketing, and distribution occur. Income is *likely* to be a condition necessary for the realization of scope economies, since scope economies pertain to the willingness of consumers to buy multiple, related products. That is *more likely* to occur in markets populated by higher, rather than lower, household income.[398]

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[394] Frontier Comments at 2-3.

[395] *See* USTA Comments at 12-13.

[396] *See* MCI Comments at 15.

[397] PacTel Comments at 16 ("Size is not an absolute correlative of economies of scale or scope."). *See also* RTC Comments at 19 ("Size alone does not control whether the requested co-provision will increase the economies of scale or scope for the requesting carrier."); Southwestern Bell Comments at 3 ("Any eligible carrier, regardless of size, could conceivably lack economies of scale or scope for particular infrastructure in a specific service area relative to another carrier."); USTA Comments at 12, n. 7 ("[T]he Commission is correct to note that a carrier could lack economies of scale or scope for only some facilities, but have economies of scale or scope for others.").

[398] MCI Comments at 15 (emphasis added).

MCI concludes with the observation that it is not aware of studies estimating the extent of scale and scope economies at different levels of aggregation (i.e., at the plant, company. and holding company level).[399] Nor does any other party reference such studies.

157. With respect to whether classes of carriers would, *per se*, qualify as lacking economies of scale or scope, BellSouth, in remarks generally representative of the LEC commenters, argues that the Commission should resist the temptation to establish firm thresholds, such as any based on a carrier's size, as a means of defining qualifying carriers.[400] NCTA disagrees strongly, asserting that Congress plainly did not intend for carriers as large as the BOCs or GTE to be eligible to obtain infrastructure from other carriers under section 259.[401] The majority of commenting parties nevertheless support the concept of a rebuttable presumption.[402] With some qualification,[403] most commenting parties further support the establishment of a

[399] *Id.*

[400] BellSouth Comments at 7; *See also, e.g.*, Southwestern Bell Comments at 2-3 ("Congress did not specify that Section 259 would apply categorically to only one class of carriers and the Commission should not impose such a rule."). *Cf.* AT&T Comments at 3 ("[I]dentification of the particular carriers that satisfy this standard for any specific facility or set of facilities could entail a case-by-case analysis of the carriers' and [incumbent LECs'] relative investment costs. Such a procedure would be incredibly burdensome for putative qualifying carriers, [incumbent LECs], and the Commission."). *But see* Frontier Comments at 3 ("As a starting point, the Commission should declare that non-rural telephone companies are categorically ineligible to request infrastructure-sharing agreements."); NCTA Comments at 3 ("The Commission should specify that a carrier may request network capabilities through an infrastructure sharing agreement only if it (i) is a rural telephone company, as defined in the Communications Act, and (ii) serves, in combination with its affiliates, fewer than two percent of the Nation's subscriber lines installed in the aggregate nationwide."(footnote omitted)).

[401] NCTA Reply Comments at 8.

[402] *See, e.g.*, AT&T Comments at 3-4 ("the Commission should . . . establish a rebuttable presumption that carriers with certain size characteristics, in terms of number of lines served, lack economies of scale and scope and thus are 'qualifying carriers' under Section 259(d)."); BellSouth comments at 6 ("BellSouth supports the proposal suggested in the *Notice* that the Commission rely on a rebuttable presumption as the initial means of designating a class of companies that lack economies of scope or scale.").

[403] AT&T Comments at 4; MCI Comments at 15-16 ("[The discussion of economies of scope and scale] does lend support for the Commission's suggestion that companies that have no corporate parent, that serve rural or low-income areas not contiguous with a non-rural or non low-income area it also serves, would automatically qualify as a Section 259 carrier, provided they also met the Section 214(e) criteria."); ALLTEL Comments at 3 ("[R]ural telephone companies (as defined under the Act) should not be subject to an FCC requirement to share infrastructure. As an alternative, the Commission could adopt an approach under which a LEC would be required to serve as a providing carrier only where its economies of scale and scope exceed those of the qualifying carrier by a specified degree.").

rebuttable presumption that companies meeting the definition of "rural telephone company" in section 3(37) of that Act also meet the requirements of section 259(d)(1).[404]

158. Many of the parties that support establishing a rebuttable presumption also comment on various aspects of what should be rebuttable, and by whom. Southwestern Bell notes that even rural LECs may enjoy economies of scale and scope, and argues that an incumbent LEC that has been requested to share must be allowed to rebut any presumption.[405] BellSouth asserts that the burden is on the requesting carrier to support its contention that it is a qualifying carrier.[406] Some parties argue that telecommunications entities that are *not* rural telephone companies under the definition of Section 3(37) may nevertheless meet the requirements of Section 259(d)(1) if they can demonstrate a lack of economies of scope or scale.[407] GTE argues, to similar practical effect, that the Commission must permit individual operating units that do not meet the statutory definition of rural telephone company to demonstrate that they are eligible to proceed under section 259 in a particular service area.[408]

159. In contrast, NCTA would disqualify all non-rural telephone companies and require any otherwise qualified rural telephone company to show that because it lacks economies or scale or scope "it is economically unreasonable for [it] to deploy the capability, feature or function sought in the agreement."[409] Similarly, NYNEX argues that a telecommunications carrier, including a rural telephone company, that is affiliated with a holding company does *not* lack economies of scale or scope.[410] As noted earlier in this subsection, NCTA also opposes companies as large as the BOCs and GTE being able to qualify for sharing agreements under section 259.

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[404] ALLTEL Comments at 2; Ameritech Comments at 7-8; AT&T Comments at 3-4; BellSouth Comments at 7; GTE Reply Comments at 14; Castleberry Telephone Company *et al.* Comments at 2; Minnesota Coalition Comments at 10-11; NYNEX Comments at 17-18; RTC Comments at 19; USTA Comments at 12-13.

[405] Southwestern Bell Reply Comments at 5; *see also* RTC Comments at 19 ("An [incumbent LEC] asked to share infrastructure should be allowed to rebut that presumption . . . since the information to make the comparison will be primarily in its control.").

[406] BellSouth Comments at 8.

[407] *See, e.g.*, AT&T Reply Comments at 3 ("In other circumstances, if a non-qualifying carrier can show that a sharing arrangement with its affiliates for the services requested is economically unreasonable as contemplated under section 259(b)(1), and that its economies of scale or scope would be greater if shared with the unaffiliated incumbent local exchange carrier ("ILEC"), the presumption can be reversed.").

[408] GTE Reply Comments at 14.

[409] NCTA Comments at 3. *Contra* RTC Reply Comments at 5-6.

[410] NYNEX Reply Comments at 11 ("Notwithstanding certain commenters assertions, the FCC should permit such economies to be determined up to the holding company level." (footnotes omitted)).

160. Commenting parties generally agree that an incumbent LEC could be both a "qualifying" and a "providing" carrier for purposes of section 259.[411] There is strong disagreement among the parties, however, about whether the holding company or an operating entity is the appropriate level of organization at which to consider whether a carrier lacks economies of scale or scope. AT&T, NYNEX, NCTA and apparently the Minnesota Coalition argue that the holding company is the appropriate level to consider[412] and MCI, GTE, RTC, USTA, and apparently PacTel argue it is not.[413]

161. Several parties observe that the making of comparisons is inherent in considering economies of scale and scope.[414] Only a few parties, however, discuss our tentative conclusion that the cost of the investment that the carrier would incur to acquire on its own the requested

[411] RTC Comments at 20-21 ("The same LEC could, conceivably, be 'qualified' to request infrastructure sharing from one carrier and be required to serve as the providing [incumbent LEC] in response to a request for sharing by another carrier. The relative cost to the requester for co-provision and self-provision would be relevant to whether it was 'qualified' with regard to a given request."); GTE Comments at 11 ("The Commission should . . . recognize that a carrier may be both a providing LEC and a qualifying LEC under the Act. For example, a rural LEC may be eligible as a qualifying carrier to share the facilities of a neighboring LEC to provide SS7-based services. However, that same qualifying LEC may also have advanced technologies that a separate neighboring carrier may wish to share. It is also possible that a carrier will have certain facilities in one service area, but lack them in another."). *Cf.* ALLTEL Comments at 2-3 ("[T]he Commission correctly notes . . . that the economies of scale and scope are relative, and not absolute, determinations; a small LEC which may be a 'qualifying carrier' vis-a-vis a vastly larger LEC could nevertheless be considered a providing carrier by another small or rural carrier. Rather than simply compare the relative costs of deploying infrastructure between providing and qualifying carriers . . . [ALLTEL suggests] that rural telephone companies . . . should not be subject to an FCC requirement to share infrastructure."). *But see* NCTA Comments at 3 n.10 (asserting that the Commission should not permit a carrier to be both a provider and a recipient under section 259).

[412] AT&T Comments at 4-5 ("Entities that hold multiple local telephone companies . . . clearly have exactly those opportunities for economies of scale and scope that Section 259 reserves for 'qualifying carriers' that lack such capabilities."); NYNEX Comments at 17 ("...seemingly small companies may have economies by virtue of their affiliation with large holding companies."); NYNEX Reply Comments at 11 ("Clearly, a [qualifying carrier] can enjoy economies of scale or scope by virtue of its dealings with affiliates in regard to the procurement process, scientific research and development, etc.); NCTA Reply Comments at 8-9; Minnesota Coalition Comments at 11-12 ("[A] large carrier, such as an RBOC, AT&T or MCI, does not lack 'economies of scale or scope' even if a particular project could be provided at a lower cost through infrastructure sharing with an incumbent.").

[413] MCI Comments at 15 ("A telecommunications holding company may achieve financing economies, but these economies may dwarf in comparison to the diseconomies it might face if it were to serve an isolated, small, rural community."); GTE Comments at 10; GTE Reply Comments at 13; RTC Comments at 19-20; RTC Reply Comments at 5; USTA Comments at 13-14; USTA Reply Comments at 7-8 ("The language of the Act should not be altered to be applied only at the holding company level, as suggested by AT&T."); PacTel Comments at 16.

[414] GTE Reply Comments at 13 ("[T]he statute contemplates a comparison of economies of scale and scope between the providing LEC and the qualifying LEC; it does not articulate a particular standard which the qualifying LEC must meet."); Southwestern Bell Comments at 3 ("Economies of scale and scope are not absolute measures, but rather are relative conditions that likely exist to varying degrees for all LECs."); USTA Comments at 12-13. *See also* MCI Comments at 16.

infrastructure, relative to the cost that it would incur to obtain the requested infrastructure from an incumbent LEC, is a factor to be considered in whether a carrier lacks economies of scale or scope. MCI notes that the total costs of production include costs other than investment costs.[415] Southwestern Bell says that an analysis of relative investment costs could be used if there is insufficient information to analyze both requesting and supplying firms' costs over a relevant range of output.[416] The Minnesota Coalition argues against our tentative conclusion, arguing that project investment costs will be extremely difficult to determine.[417]

162. Parties addressing section 259(d)(2) generally comment that the statutory qualification criteria are unproblematic since the underlying issues will be decided in the universal service proceeding.[418] Nonetheless, two issues are raised. NYNEX, noting that section 259(d)(2) requires a qualifying carrier to make universal service offerings available "without preference" throughout the service area for which it has eligibility status under section 214(e), argues that the Commission should interpret section 259(d)(2) to mean the qualifying carrier must itself be an incumbent LEC in that area, and offer common carrier services on a facilities basis.[419] USTA notes the relative timing of this docket and the universal service proceeding and asserts that carriers need not await the outcome of the universal service proceeding to begin negotiating section 259 agreements if they have already been subjected to carrier of last resort obligations by the state in which they operate.[420]

3. Discussion

163. Section 259(d)(1) directs the Commission to prescribe regulations that determine whether a telecommunications carrier "lacks economies of scale or scope." In implementing this directive we are mindful of section 259(b)(4), which directs the Commission to prescribe regulations ensuring that a qualifying carrier fully benefits from "the economies of scale and scope" of the incumbent LEC that makes shared infrastructure available to it. We decide that, while neither the Act nor the legislative history defines either of these terms, it is reasonable to conclude that there is implicit in the two directives a comparison between carriers that have "greater" and "lesser" economies of scale or scope, and that a carrier that has lesser economies of scale or scope may obtain the benefits of shared infrastructure from an incumbent LEC that has greater economies of scale or scope. We therefore decide it is unnecessary to prescribe regulations to define an absolute lack of economies of scale or scope. Further, we concur with

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[415] MCI Comments at 16.

[416] Southwestern Bell Comments at 3.

[417] Minnesota Coalition Comments at 11.

[418] *See, e.g.*, AT&T Comments at 2-3; RTC Comments at 21.

[419] NYNEX Comments at 19-20.

[420] USTA Comments at 14-15.

those commenters who observe that economies of scale or scope -- or their absence -- may characterize any firm, including a firm affiliated with a larger company.

164. We therefore conclude that neither the plain language of section 259(d)(1) nor the record of this proceeding support establishing regulations that would excuse, *per se*, an incumbent LEC from sharing its infrastructure because of the size of the requesting carrier, its geographic location, or its affiliation with a holding company. The record before us demonstrates that whether a telecommunications carrier "lacks economies of scale or scope" depends on the facts of the particular situation, including the specific terms of the request to share infrastructure, whether the incumbent LEC would incur lower costs to deploy that particular infrastructure than would the qualifying carrier, and the benefits that the qualifying carrier would receive from the availability, timeliness, functionality, suitability, and other operational aspects of the shared infrastructure.[421] One predictable result of this approach to defining section 259(d)(1) is that a carrier may be entitled to share infrastructure with a particular incumbent LEC and, at the same time, be obligated to share infrastructure with one or more additional qualifying carriers.

165. We decide that parties negotiating infrastructure sharing agreements should undertake the necessarily fact-based evaluations of their relative economies of scale and scope pertaining to the infrastructure that is requested to be shared. In the event that parties cannot achieve satisfactory results, they will have recourse to informal consultations with the Commission and, if necessary, existing declaratory ruling procedures and the Commission's complaint process.

166. We expect that many if not most requests for infrastructure sharing agreements properly will be made by carriers whose customers reside predominantly, if not exclusively, in rural, sparsely-populated areas, because such carriers are more likely to lack economies of scale or scope in serving their customers. To facilitate the negotiation of infrastructure sharing agreements benefiting the customers of such carriers, we therefore adopt a rebuttable presumption that a telecommunication carrier falling within the definition of "rural telephone company" in section 3(37) of the Act lacks economies of scale or scope under section 259(d)(1), but we exclude no carrier or class of carriers from attempting to show that they lack economies of scale or scope for purposes of section 259(d)(1). Thus, an incumbent LEC receiving a request from a rural telephone company seeking to qualify under section 259(d)(1) may rebut the presumption by demonstrating that the requesting company does not lack economies of scale and scope, relative to those of the incumbent LEC receiving the request, with respect to the requested infrastructure. In so doing, the incumbent LEC may demonstrate the presence of any economies of scale or scope the rural telephone company may have, with respect to the requested infrastructure, by virtue of any affiliations it may have within a holding company structure. Also, a carrier that does not meet the definition of section 3(37) may qualify under section 259(d)(1) by demonstrating to the incumbent LEC to which it directs its infrastructure sharing request a relative lack of economies of scale or scope with respect to the requested infrastructure. We are

[421] *See also* Discussion at Section III. C. 4., *supra*.

convinced that this approach will facilitate the negotiation of infrastructure sharing agreements most likely to benefit customers served by carriers that lack economies of scale or scope, without excluding any group of customers from the benefits of infrastructure sharing. We note that a rebuttable presumption was supported by most parties commenting in this proceeding. We also note that parties may avail themselves of guidance from the Commission, pursuant to our declaratory ruling and complaints processes, if disputes arise. As always, we expect parties to make good faith efforts to negotiate resolutions of such disputes prior to requesting our assistance.

167. Although we expect that, in the ordinary course, most section 259 agreements will be negotiated between small, particularly rural telephone companies and larger incumbent LECs, there is nothing in the statutory language or legislative history to persuade us that Congress intended such a *per se* restriction on who can qualify under section 259(d). We anticipate, for example, that some carriers affiliated with larger carriers might be able to demonstrate that, for particular elements of infrastructure, they also lack "economies of scale or scope" per the requirements of section 259(d)(1). We do not believe that such carriers should be precluded from securing section 259 agreements upon a proper showing under section 259(d)(1). Nonetheless, as we have indicated *supra*,[422] we have concerns about the effects on competitive entry as a result of the implementation of section 259 agreements. We expect that such agreements will not result in large companies effectively insulating particular markets from competitive entry. We emphasize that section 259, as articulated in this Report and Order, shall not be used to achieve such anticompetitive results.

168. We affirm our conclusion that, because a separate proceeding is underway to implement section 254 of the Act, the Commission need not consider or construe section 259(d)(2) in this rulemaking.[423] Parties commenting in this proceeding generally agreed with this conclusion. We observe that NYNEX's assertion that a telecommunications carrier must be an incumbent LEC to meet the requirements of section 259(d)(2) would not appear to be mandated by the language of section 259(d)(2) and might be in direct conflict with the Act's objective to open all telecommunications markets to competition. Section 259(d)(2) imposes specific requirements on carriers. Such carriers will predictably include, but might not be limited to, incumbent LECs. We also decline to adopt USTA's interpretation of section 259(d)(2) that would allow carriers subjected to carrier of last resort obligations to negotiate infrastructure sharing arrangements prior to the issuance of an order in the universal service rulemaking,[424] which will be adopted no later than May 8, 1997. We observe that section 259(d)(2) references section

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[422] Section III. A. *See also* Section III. B. 1., *supra*.

[423] NPRM at ¶ 38. *See also Joint Board Recommendation on Universal Service*. Our conclusion encompasses NYNEX's suggestion that only facilities-based telecommunications common carriers should meet the requirements of section 259(d)(2).

[424] *See Universal Service NPRM; see also Joint Board Recommendation on Universal Service* (recommending eligibility criteria for carriers seeking universal service support).

214(e), which reserves designation authority to the states. Section 214(e)(1)(A), moreover, requires that eligible telecommunications carriers shall "offer the services that are supported by Federal universal support mechanisms under section 254(c) . . . ."[425] By definition, however, such services will not be identified until the Commission adopts an order in the universal service proceeding.

IV. PROCEDURAL ISSUES

A. Final Regulatory Flexibility Act Analysis

169. Pursuant to the Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. Section 601 *et seq.*, the Commission's final analysis in this Report and Order is attached as Appendix C.

B. Final Paperwork Reduction Act Analysis

170. As required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, the NPRM invited the general public and the Office of Management and Budget (OMB) to comment on proposed information collection requirements contained in the NPRM.[426] On January 22, 1997, OMB approved the proposed information collection requirements, as submitted to OMB, in accordance with the Paperwork Reduction Act.[427] In this Report and Order, we adopt information collection requirements that are subject to OMB review. These requirements are contingent upon approval by OMB.

V. ORDERING CLAUSES

171. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201-205, 259, 303(r), 403 of the Communications Act of 1934, as amended by the 1996 Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 259, 303(r), 403, the rules, requirements and policies discussed in this Report and Order ARE ADOPTED and sections 59.1- 59.4 of the Commission's rules, 47 C.F.R. §§ 59.1 - 59.4 ARE ADOPTED as set forth in Appendix B.

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[425] 47 U.S.C. § 214(e)(1)(A).

[426] NPRM at ¶ 55.

[427] *Notice of Office of Management and Budget Action* (OMB No. 3060-0755) (Jan. 22, 1997).

172. IT IS FURTHER ORDERED that the requirements and regulations established in this decision shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A - List of Commenters in Docket 96-237

Comments:
ALLTEL Telephone Services Corporation (ALLTEL)
Association for Local Telecommunications Services (ALTS)
Ameritech
AT&T Corp. (AT&T)
BellSouth Corporation (BellSouth)
Frontier Corporation (Frontier)
GTE Service Corporation (GTE)
Jackson Thornton & Company (on behalf of Castleberry Telephone Company, Ardmore Telephone Company, Hopper Telecommunications Co., Inc., Mon-Cre Telephone Cooperative, Inc., New Hope Telephone Cooperative, Inc., Ragland Telephone Co., Inc., Blountsville Telephone Co., Inc., Bledsoe Telephone Cooperative, and Farmers Telephone Cooperative, Inc.) (collectively, Castleberry Telephone Company *et al.*)
MCI Communications Corporation (MCI)
Minnesota Independent Coalition (Minnesota Coalition)
National Rural Health Association*
National Cable Television Association, Inc. (NCTA)
NYNEX Telephone Companies (NYNEX)
Octel Communications Corporation (Octel)
Oregon Public Utility Commission (Oregon PUC)
Pacific Telesis Group (PacTel)
Rural Telephone Coalition (RTC)
Southwestern Bell Telephone Company (Southwestern Bell)
Sprint Corporation (Sprint)
University of Alabama School of Medicine*
United States Telephone Association (USTA)
US WEST, Inc. (US West)

* Referred to CC Docket No. 96-45

Reply Comments:
ALTS
AT&T
BellSouth
GTE
MCI
NCTA
NYNEX
Octel
PacTel
RTC
Southwestern Bell

Sprint
USTA
US West

APPENDIX B - FINAL RULES

1. Part 59 of Title 47 of the Code of Federal Regulations (C.F.R.) is added to read as follows:

PART 59 -- INFRASTRUCTURE SHARING

Sec.
59.1 General Duty
59.2 Terms and Conditions of Infrastructure Sharing
59.3 Information Concerning Deployment of New Services and Equipment
59.4 Definition of "Qualifying Carrier"

AUTHORITY: Sections 4(i), 4(j), 201-205, 259, 303(r), 403 of the Communications Act of 1934, as amended by the 1996 Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 259, 303(r), 403, unless otherwise noted.

Sec. 59.1 General Duty

Incumbent local exchange carriers (as defined in 47 U.S.C. section 251(h)) shall make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has obtained designation as an eligible telecommunications carrier under section 214(e) of this title (47 U.S.C. 214(e)).

Sec. 59.2 Terms and Conditions of Infrastructure Sharing

(a) An incumbent local exchange carrier subject to the requirements of section 59.1 shall not be required to take any action that is economically unreasonable or that is contrary to the public interest;

(b) An incumbent local exchange carrier subject to the requirements of section 59.1 may, but shall not be required to, enter into joint ownership or operation of public switched network infrastructure, technology, information and telecommunications facilities and functions and services with a qualifying carrier as a method of fulfilling its obligations under section 59.1;

(c) An incumbent local exchange carrier subject to the requirements of section 59.1 shall not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any public switched network infrastructure, technology, information, or telecommunications facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section;

(d) An incumbent local exchange carrier subject to the requirements of section 59.1 shall make such public switched network infrastructure, technology, information, and telecommunications facilities, or functions available to a qualifying carrier on just and reasonable terms and pursuant to conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier. An incumbent local exchange carrier that has entered into an infrastructure sharing agreement pursuant to section 59.1 must give notice to the qualifying carrier at least sixty days before terminating such infrastructure sharing agreement.

(e) An incumbent local exchange carrier subject to the requirements of section 59.1 shall not be required to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier's telephone exchange area; and

(g) An incumbent local exchange carrier subject to the requirements of section 59.1 shall file with the State, or, if the State has made no provision to accept such filings, with the Commission, for public inspection, any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure, technology, information and telecommunications facilities and functions pursuant to this Part.

Sec. 59.3 Information Concerning Deployment of New Services and Equipment

An incumbent local exchange carrier subject to the requirements of section 59.1 that has entered into an infrastructure sharing agreement under section 59.1 shall provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment.

Sec. 59.4 Definition of "Qualifying Carrier"

For purposes of this Part, the term "qualifying carrier" means a telecommunications carrier that--

(1) lacks economies of scale or scope; and

(2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e) of this title.

APPENDIX C
FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

1. As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996.[428] The Commission sought written public comments on the proposals in the *Infrastructure Sharing NPRM* including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104-121, 110 Stat. 847 (1996).[429]

A. Need for and Objectives of this Report and Order and the Rules Adopted Herein

2. The Commission, in compliance with section 259(a) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, promulgates the rules in this Report and Order to ensure the prompt implementation of the infrastructure sharing provisions in section 259 of the 1996 Act. Section 259 directs the Commission, within one year after the date of enactment of the 1996 Act, to prescribe regulations that require incumbent LECs to make certain "public switched network infrastructure, technology, information, and telecommunications facilities and functions" available to any qualifying carrier in the service area in which the qualifying carrier has requested and obtained designation as an eligible carrier under section 214(e).[430]

B. Summary and Analysis of the Significant Issues raised by the Public Comments in Response to the IRFA

3. The only party to comment on our IRFA, the Rural Telephone Coalition (RTC), essentially argues that the Commission violated the RFA when we declined to include small incumbent LECs in our definition of the class of entities protected by the RFA.[431] RTC argues that small incumbent LECs that meet the SBA definition of "small entities" are among the class of carriers that will be affected by these rules either as providing incumbent LECs or as

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[428] Implementation of Infrastructure Sharing Provisions of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket No. 96-237, FCC 96-456, 61 Fed. Reg. 63774 (rel. Nov. 22, 1996) (*NPRM* or *Infrastructure Sharing NPRM*).

[429] SBREFA was codified as Title II of the Contract With America Advancement Act of 1996 (CWAAA), 5 U.S.C. § 601 *et seq.*

[430] 47 U.S.C. § 259. *See also* 47 U.S.C. § 214(e)(1).

[431] RTC Comments at 631.

qualifying carriers.[432] RTC argues that the Commission has engaged in a "meaningless exercise" despite the fact that our IRFA included estimates of the number of small incumbent LECs potentially affected by the proposed rules and presented alternatives for comment by the public.

4. We disagree. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and "small business concerns."[433] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we did consider small incumbent LECs within the IRFA and used the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[434] We find nothing in this record to persuade us that our prior practice of treating all LECs as dominant is incorrect. Thus, we conclude that we have fully satisfied the requirements and objectives of the RFA.

C. Description and Estimate of the Number of Small Entities to which the Rules adopted in the Report and Order in CC Docket No. 96-237 will Apply

5. Section 259 of the 1934 Act, as added by the 1996 Act, establishes a variety of infrastructure sharing obligations.[435] Many of the obligations adopted in this Report and Order will apply solely to providing incumbent LECs which may include small business concerns.[436] The beneficiaries of section 259 infrastructure sharing agreements -- also affected by the rules adopted herein -- are the class of carriers designated as "qualifying carriers" under section 259(d).[437] Such qualifying carriers must be telecommunications carriers, which, as defined in section 3(44) of the Act, may include LECs, non-LEC wireline carriers, and various types of wireless carriers.[438] Because section 259(d)(1) limits qualifying carriers to those carriers that "lack economies of scale or scope," it is likely that there will be small business concerns affected

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[432] *Id.*

[433] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, 61 Fed. Reg. 45476 at ¶¶ 1328-30, 1342 (rel. Aug. 8, 1996) (*Local Competition First Report and Order*). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the *Local Competition First Report and Order*, pending review on the merits. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir., Oct. 15, 1996).

[434] *See id.*

[435] 47 U.S.C. § 259.

[436] *See, e.g.*, 47 U.S.C. § 259(a).

[437] 47 U.S.C. § 259(a), (d).

[438] 47 U.S.C. § 259(d). *See also* 47 U.S.C. § 3(44).

by the rules proposed in this *NPRM*. We note, however, that section 259(d)(2) makes the definition of "qualifying carriers" dependent on the Commission's decisions in the universal service proceeding.[439] Until the Commission issues an order pursuant to the *Universal Service NPRM* that addresses related issues, it is not feasible to define precisely the number of "qualifying carriers" that may be "small business concerns" or, derivatively, the number of incumbent LECs that may be "small business concerns."[440] With that caveat, we attempt to estimate the number of small entities -- both providing incumbent LECs and qualifying carriers -- that may be affected by the rules included in this Report and Order.

6. For the purposes of this analysis, we examined the relevant definition of "small entity" or "small business" and applied this definition to identify those entities that may be affected by the rules adopted in this Report and Order. The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[441] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[442] Moreover, the SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[443] We first discuss generally the total number of small telephone companies falling within both of those categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

7. As discussed *supra*, and consistent with our prior practice, we shall continue to exclude small incumbent LECs from the definition of "small entity" and "small business concerns" for the purpose of this IRFA. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definition of "small entity" and

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[439] 47 U.S.C. § 259(d)(2). *See* Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking and Order Establishing Joint Board*, CC Docket No. 96-45, FCC 96-93 (rel. Mar. 8, 1996) ("*Universal Service NPRM*").

[440] *See Universal Service NPRM; see also Joint Board Recommendation on Universal Service* (recommending eligibility criteria for carriers seeking universal service support). We note that the Commission must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.

[441] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

[442] 15 U.S.C. § 632.

[443] 13 C.F.R. § 121.201.

"small business concerns."[444] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[445]

1. Telephone Companies (SIC 481)

8. *Total Number of Telephone Companies Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies identified by the SBA. The United States Bureau of the Census (Census Bureau) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.[446] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[447] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order.

9. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telecommunications companies other than radiotelephone (wireless) companies (Telephone Communications, Except Radiotelephone). The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[448] According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than 1,500 persons.[449] Of the 2,321 non-radiotelephone companies listed by the Census Bureau, 2,295 companies (or, all but 26) were reported to have fewer than 1,000 employees. Thus, at least 2,295 non-radiotelephone companies might qualify as small incumbent LECs or small entities based on these employment statistics.

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[444] *See Local Competition First Report and Order* at ¶¶ 1328-30, 1342.

[445] *See id.*

[446] United States Department of Census, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("*1992 Census*").

[447] 15 U.S.C. § 632(a)(1).

[448] *1992 Census*, *supra*, at Firm Size 1-123.

[449] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

However, because it seems certain that some of these carriers are not independently owned and operated, this figure necessarily overstates the actual number of non-radiotelephone companies that would qualify as "small business concerns" under the SBA's definition. Consequently, we estimate using this methodology that there are fewer than 2,295 small entity telephone communications companies (other than radiotelephone companies) that may be affected by the proposed decisions and rules and we seek comment on this conclusion.

10. *Local Exchange Carriers.* Although neither the Commission nor the SBA has developed a definition of small providers of local exchange services, we have two methodologies available to us for making these estimates. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813) (Telephone Communications, Except Radiotelephone) as previously detailed, *supra*. Our alternative method for estimation utilizes the data that we collect annually in connection with the Telecommunications Relay Service (TRS). This data provides us with the most reliable source of information of which we are aware regarding the number of LECs nationwide. According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[450] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of incumbent LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small LECs (including small incumbent LECs) that may be affected by the actions proposed in this *NPRM*.

11. Our remaining comments are directed solely to non-LEC entities that may eventually be designated as "qualifying carriers." Section 259(d)(2) requires qualifying carriers, *inter alia*, to offer "telephone exchange service, exchange access, and any other service that is included in universal service" within the carrier's service area per universal service obligations imposed pursuant to section 214(e). As addressed *supra*, because section 259(d)(2) makes the scope of potential "qualifying carriers" contingent upon the Commission's decisions in the universal service proceeding, we are unable to define the scope of small entities that might eventually be designated as "qualifying carriers."[451] Thus, the remaining estimates of the number of small entities affected by our rules -- based on the most reliable data for the non-LEC wireline and non-wireline carriers -- may be overinclusive depending on how many such entities otherwise qualify pursuant to section 259(d)(2).

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[450] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (Dec. 1996) (*"TRS Worksheet"*).

[451] *See Universal Service NPRM; see also Joint Board Recommendation on Universal Service* (recommending eligibility criteria for carriers seeking universal service support). We note that the Commission must complete a proceeding to implement the Joint Board's recommendations on or before May 8, 1997.

12. *Non-LEC wireline carriers.* We next estimate the number of non-LEC wireline carriers, including interexchange carriers (IXCs), competitive access providers (CAPs), Operator Service Providers (OSPs), Pay Telephone Operators, and resellers that may be affected by these rules. Because neither the Commission nor the SBA has developed definitions for small entities specifically applicable to these wireline service types, the closest applicable definition under the SBA rules for all these service types is for telephone communications companies other than radiotelephone (wireless) companies. However, the TRS data provides an alternative source of information regarding the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers nationwide. According to our most recent data: 130 companies reported that they are engaged in the provision of interexchange services; 57 companies reported that they are engaged in the provision of competitive access services; 25 companies reported that they are engaged in the provision of operator services; 271 companies reported that they are engaged in the provision of pay telephone services; and 260 companies reported that they are engaged in the resale of telephone services and 30 reported being "other" toll carriers.[452] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs, CAPs, OSPs, Pay Telephone Operators, and resellers that would qualify as small business concerns under SBA's definition. Firms filing *TRS Worksheets* are asked to select a single category that best describes their operation. As a result, some long distance carriers describe themselves as resellers, some as OSPs, some as "other," and some simply as IXCs. Consequently, we estimate that there are fewer than 130 small entity IXCs; 57 small entity CAPs; 25 small entity OSPs; 271 small entity pay telephone service providers; and 260 small entity providers of resale telephone service; and 30 "other" toll carriers that might be affected by the actions and rules adopted in this *Report and Order*.

13. *Radiotelephone (Wireless) Carriers*: The SBA has developed a definition of small entities for Wireless (Radiotelephone) Carriers. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[453] According to the SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[454] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although it seems certain that some of these carriers are not independently owned and operated, and, we are unable to estimate with greater precision the number of radiotelephone carriers and service providers that would both qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that might be affected by the actions and rules adopted in this *Report and Order*.

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[452] *TRS Worksheet*, at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

[453] *1992 Census, supra*, at Firm Size 1-123.

[454] 13 C.F.R. § 121.201, (SIC Code 4812).

14. *Cellular and Mobile Service Carriers*: In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 138 companies reported that they are engaged in the provision of mobile services.[455] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 792 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this *Report and Order*.

15. *Broadband PCS Licensees.* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the category of radiotelephone carriers, Broadband PCS Licensees. The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[456] The Commission has auctioned broadband PCS licenses in Blocks A through F. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 183 winning bidders that qualified as small entities in the Blocks C, D, E, and F auctions. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in the *Infrastructure Sharing Report & Order* includes, at a minimum, the 183 winning bidders that qualified as small entities in the Blocks C through F broadband PCS auctions.

D. Description of Projected Reporting, Recordkeeping and other Compliance Requirements and Steps Taken to Minimize the Significant Economic of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected

[455] *TRS Worksheet*, at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

[456] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report & Order, 9 FCC Rcd 5532, 5581-84 (1994).

16. In this section of the FRFA, we analyze the projected reporting, recordkeeping, and other compliance requirements that may apply to small entities and small incumbent LECs, and we mention some of the skills needed to meet these new requirements. We also describe the steps taken to minimize the economic impact of our decisions on small entities and small incumbent LECs, including the significant alternatives considered and rejected. Overall, we anticipate that the impact of these rules will be beneficial to small businesses since they may be able to share infrastructure with larger incumbent LECs, in certain circumstances, enabling small carriers to provide telecommunication services or information services that they otherwise might not be able to provide without building or buying their own facilities.[457]

1. Section 259(a)

17. *Summary of Projected Reporting, Recordkeeping, and other Compliance Requirements.* Regarding the scope of section 259(a), we allow the parties to section 259 agreements to negotiate what "public switched network infrastructure, technology, information, and telecommunications facilities and functions" will be made available, without *per se* exclusions.[458] In addition, we conclude that qualifying carriers should be able to obtain network facilities and functionalities available under section 251 -- including lease arrangements and resale -- alternatively pursuant to section 251 or pursuant to section 259 (subject to the limitations in section 259(b)(6)), or pursuant to both if they so choose.[459]

18. To the extent that there are small businesses that are providing incumbent LECs, they will be required to make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to defined qualifying carriers. We anticipate that compliance with such requests for infrastructure sharing may require the use of legal, engineering, technical, operational, and administrative skills. At the same time, these rules should create opportunities for small businesses that are qualifying carriers to utilize infrastructure that might not otherwise be available. To obtain access to infrastructure from a providing incumbent LEC, a qualifying carrier is required to pay the costs associated with the shared infrastructure.

19. *Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected.* We reject proposals offered by those parties who would assert limitations that remove whole classes or categories of "public switched network infrastructure, technology, information and telecommunications facilities and functions" -- *e.g.*, resale services and classes

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[457] 47 U.S.C. § 259(a).

[458] *See Infrastructure Sharing Report and Order* Discussion at Section III. A., *supra.*

[459] *See Infrastructure Sharing Report and Order* Discussion at Section III. B. 1., *supra.*

of non-network information -- from the scope of section 259(a).[460] Similarly, we declined to exclude section 251-provided interconnection elements from section 259 arrangements.[461] We believe that the flexible approach that we adopt will give parties the ability to negotiate unique agreements that will vary based on individual requirements of parties in each case. Such an approach is particularly important because as technology continues to evolve, definitions based on present network requirements seem likely to limit qualifying carriers' opportunities to obtain infrastructure unnecessarily. Further, we found no clear evidence of Congressional intent to limit the broad parameters of section 259(a).

20. Overall, we believe that there will be a significant positive economic impact on small entity carriers that -- as a result of section 259 agreements -- will be able to provide advanced telecommunications and information services in the most efficient manner possible by taking advantage of the economies of scale and scope of incumbent LECs. With regard to any small incumbent LECs that might receive requests for infrastructure sharing from qualifying carriers, we believe that the statutory scheme imposed by Congress and adopted in our rules will promote small business interests. First, we note that section 259(b)(1) protects providing incumbent LECs -- small and large, alike -- from having to take any actions that are economically unreasonable.[462] Second, we note that, under our rules, an incumbent LEC may demonstrate that the requesting carrier does not lack economies of scale and scope, relative to itself, with respect to the requested infrastructure and, thus, may avoid infrastructure sharing obligations in certain situations.[463]

2. Section 259(b) Terms and Conditions of Infrastructure Sharing

21. *Summary of Projected Reporting, Recordkeeping, and other Compliance Requirements.* We require that providing LECs can recover their costs associated with infrastructure sharing arrangements, and we conclude that market incentives already exist to encourage providing and qualifying carriers to reach negotiated agreements that do so (section 259(b)(1)).[464] Congress directed in section 259(b)(4) that providing incumbent LECs make section 259 agreements available to qualifying carriers on just and reasonable terms and

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[460] *See, e.g.*, GTE Comments at 4 ("Section 259 requires only the sharing of infrastructure, not services. When Congress intended to include services, it did so specifically . . . ."); Southwestern Bell Comments at i, 5; Sprint Comments at 4 ("section 259 establishes requirements for the sharing of infrastructure, not the provision of service"); NCTA Comments at 4, n.13 (scope of section 259(a) should be no broader that section 251). *But see* RTC Comments at 7; NCTA Comments at 4, n.13 (scope of section 259(a) should be no broader that section 251). *See also Infrastructure Sharing Report and Order* Discussion at Section III. B. 1., *supra*.

[461] *See Infrastructure Sharing Report and Order* Discussion at Section III. B. 1., *supra*.

[462] *See Infrastructure Sharing Report and Order* Discussion at Section III. C., *supra*.

[463] *See Infrastructure Sharing Report and Order* Discussion at Section III. E., *supra*.

[464] *See Infrastructure Sharing Report and Order* Discussion at Section III. C. 1., *supra*.

conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such providing incumbent local exchange carriers. We decide that, although the Commission has pricing authority to prescribe guidelines to ensure that qualifying carriers "fully benefit from the economies of scale and scope of [the providing incumbent LEC]," it is not necessary at this time to exercise this authority (section 259(b)(4)).[465]

22. We decide that section 259 agreements must be filed with the appropriate state commission, or with the Commission if the state commission is unwilling to accept the filing, and must be made available for public inspection (section 259(b)(7)). Compliance with this rule will require legal and administrative skills.

23. *Steps Taken to Minimize the Significant Economic Impact of this Report and Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered and Rejected.* We generally reject proposals that incumbent LECs should be required to develop, purchase, or install network infrastructure, technology, and telecommunications facilities and functions solely on the basis of a request from a qualifying carrier to share such elements when such incumbent LEC has not otherwise built or acquired, and does not intend to build or acquire, such elements.[466] Because the record did not indicate that there would exist any scale and scope benefits in situations where the providing incumbent LEC did not also use the facilities, we concluded that such a result would be inappropriate. We believe that the approach that we adopt will enable small entity qualifying carriers to enjoy the benefits of section 259 sharing agreements without imposing undue burdens on providing incumbent LECs.

24. Further, we decline to accept various proposals that the Commission adopt pricing schemes for infrastructure shared per section 259.[467] Instead, we conclude that the negotiation process, along with the available dispute resolution, arbitration, and formal complaint processes available from the states and the Commission, will ensure that qualifying carriers fully benefit from the economies of scale and scope of providing LECs. We believe that allowing providing incumbent LECs -- including any small business -- to recover the costs associated with infrastructure sharing will encourage and facilitate infrastructure sharing agreements. We believe that such agreements will lead to mutual benefits for both qualifying carriers and providing incumbent LECs.

3. Section 259(c) Information Disclosure Requirements

[465] *See Infrastructure Sharing Report and Order* Discussion at Section III. C. 4., *supra.*

[466] MCI Comments at 7. *Contra* NYNEX Reply Comments at 10. *See Infrastructure Sharing Report and Order* Discussion at Section III. C. 1., *supra.*

[467] *See, e.g.,* MCI Comments at 7. *Contra* RTC Comments at 11. *See Infrastructure Sharing Report and Order* Discussion at Section III. C. 1. and 4., *supra.*